Filed 9/30/03 Marriage of Honda CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re the Marriage of FRED and LINDA HONDA.	
FRED HONDA, Appellant, v. LINDA HONDA, Respondent.	C042914 (Super. Ct. No. FL772138)

Appellant Fred Honda (husband) sought to terminate his spousal support obligation to respondent Linda Honda (wife) based on her cohabitation with another man. Rather than terminating support, the trial court increased wife's spousal support from $1,350 per month to $1,900 per month notwithstanding her cohabitation. Husband appeals and claims the trial court abused its discretion by increasing support in the absence of changed circumstances since the last order, failing to effectively consider wife's cohabitation, and basing its order merely on

wife's calculated needs. In view of the incomplete record before us, an appellant's appendix without a reporter's transcript and husband's failure to bring to the trial court's attention any deficiency in the court's statement of decision, we cannot find any abuse of discretion. Accordingly, we will affirm the spousal support order.

FACTUAL AND PROCEDURAL BACKGROUND

After a 20-year marriage and the birth of two children, husband and wife separated in 1986 and divorced in 1989. Under the judgment of dissolution, husband was to pay wife family support of $2,800 per month.

In 1998, upon wife's motion, the trial court entered an order setting child support at $1,464 per month and spousal support at $1,350 per month, for a total of $2,814.

In April 2002, husband moved to terminate spousal support because of wife's continuing cohabitation with another man, whom husband contended had been wife's "live-in boyfriend for over six years."[1] In her opposition to the motion, wife requested her spousal support be increased to $2,800 per month.[2]

---

[1] At the time this motion was filed, husband's attorney was under the mistaken assumption that the original order of family support from the 1989 judgment of dissolution was still in place.

[2] Wife agreed child support should terminate because the parties' youngest child had turned 18; nonetheless, she sought to keep the overall amount of support she was receiving approximately the same.

On November 15, 2002, the matter proceeded to long-cause hearing. Both parties were sworn and testified. The hearing was not recorded, however, and there is no reporter's transcript of the parties' testimony or settled statement.

The trial court issued its ruling the same day, making the following pertinent factual findings, which were later incorporated in a formal statement of decision:

"1. This is a long term marriage of 20 years, with separation in 1986.

"2. Husband has been paying child support and spousal support since 1987.

"3. Each of the parties is aging; Wife is 57, and Husband is 64. Wife has diabetes, which she controls through insulin and has had for 23 years.

"4. Husband has a landscaping and maintenance business which he started during the marriage and continues to operate.

"5. Husband is not disputing his ability to pay support.

"6. Wife has been cohabitating with Walter Mah for at least 5 years, and Mr. Mah pays the mortgage and residence-related expenses.

"7. Wife pays for the food for herself, Mr. Mah, and occasionally for daughter, Cara.

"8. Wife has generally not worked outside the home during the marriage apart from school-related work, receiving minimal pay.

"9. Wife has established that she needs $100 per month for un-reimbursed medical expenses, approximately $175 per month in

transportation costs, $150 for miscellaneous, $400 for food, $50 per month for laundry, $280 for utilities and telephone, and $400 per month for clothing. Additionally, payments toward entertainment and food eating out warrant an award of spousal support of $1,900 per month . . . .

"10. The issue of affordability of a spousal support award was never raised as an issue in dispute. The monetary contribution of Mr. Mah was established to be limited to housing. As such, the court awards $1,900 per month . . . ."

Wife submitted a proposed statement of decision to the trial court, which the trial court signed on December 9, 2002. Husband did not challenge the statement of decision or request any additional findings, but instead filed his notice of appeal two days later, appealing the court's order increasing spousal support.

DISCUSSION

I

Change of Circumstances

Husband contends the trial court abused its discretion by increasing spousal support in the absence of a change of circumstances since the previous order. Husband argues both that the trial court did not find a change of circumstances since the 1998 order and that, in any event, there was no evidence of any such change.

Husband's contention fails for two reasons. First, husband waived his right to complain that the trial court failed to find a change of circumstances when he failed to challenge the

sufficiency of the statement of decision in the trial court. (See Code Civ. Proc., § 634; *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130.)

Husband is correct that a modification of spousal support must be supported by a material change in circumstances since the prior order. (*In re Marriage of Bower* (2002) 96 Cal.App.4th 893, 899.) However, husband never informed the trial court of its failure to make a finding of changed circumstances that justified the modification. "[U]nder section 634, the party must state any objection to the statement [of decision] in order to avoid an implied finding on appeal in favor of the prevailing party." (*In re Marriage of Arceneaux*, *supra*, 51 Cal.3d at p. 1133.) "[I]f a party does not bring such deficiencies to the trial court's attention, that party waives the right to claim on appeal that the statement was deficient in these regards, and hence the appellate court will imply findings to support the judgment." (*Id.* at pp. 1133-1134; see also *In re Marriage of Jones* (1990) 222 Cal.App.3d 505, 515-516.)

Accordingly, we must imply that the trial court found a change of circumstances since the 1998 order justifying an increase in spousal support (such as an increase in the reasonable cost of satisfying wife's needs), and the only question is whether the record on appeal supports that implied finding. In the absence of a record of the hearing, however, we must presume "that the trial court acted duly and regularly and received substantial evidence to support its findings." (*Stevens v. Stevens* (1954) 129 Cal.App.2d 19, 20; see also *Hodges v. Mark*

(1996) 49 Cal.App.4th 651, 657 [lack of reporter's transcript precludes parties from raising evidentiary issues on appeal].) Thus, we must presume not only that the trial court found a change of circumstances that entitled wife to an increase in spousal support, but also that the court's finding was supported by substantial evidence.

II

Cohabitation

Husband contends the trial court abused its discretion by failing to effectively consider wife's cohabitation with Mah. By statute, cohabitation creates a rebuttable presumption of decreased need for spousal support. (Fam. Code, § 4323, subd. (a)(1).) Based on this presumption, husband contends that wife's cohabitation was "a presumptive material change of circumstances justifying a spousal support reduction." According to husband, however, the trial court "never considered the significance of" wife's cohabitation.

Contrary to husband's assertion, it is apparent from the face of the record that the trial court was fully aware of wife's cohabitation with another man when it increased husband's spousal support obligation. The trial court specifically found that wife had been cohabiting with Mah for at least five years and that Mah was paying the mortgage and residence-related expenses. Nonetheless, the court found that wife's needs and husband's ability to pay warranted spousal support of $1,900 per month.

The question before us is whether, given wife's cohabitation, the court's increase of spousal support was an

abuse of discretion. On the sparse record before us, we cannot conclude it was.

First, it is critical to note the trial court's finding that wife had been cohabiting with Mah "for at least 5 years." This means wife was cohabiting with Mah at least as far back as November 1997, *before* the last support modification in 1998.[3] On the existing record, we must presume the court was aware of the cohabitation in 1998 and took that factor into account when it set spousal support at $1,350 per month. Thus, wife's cohabitation was not a changed circumstance since the last order that would have justified a reduction in spousal support.

Second, it is significant to note the trial court's finding that "[t]he monetary contribution of Mr. Mah was established to be limited to housing." Since Mah was paying for wife's housing expenses, it is apparent that, consistent with the statutory presumption, wife's needs *were*, in fact, decreased due to her cohabitation -- specifically, she did not need any money for housing. Nonetheless, the court found she did need money for other expenses totaling $1,900 per month. On the record before us, we must presume there was substantial evidence before the trial court to support that finding (such as evidence that Mah could not or would not contribute to those additional expenses). Accordingly, we find no abuse of discretion in the trial court's

---

[3] Indeed, in his moving papers, husband specifically claimed that wife had been "cohabitat[ing] with her current live-in boyfriend for over six years."

increase in husband's spousal support obligation despite wife's cohabitation.

III

Calculated Needs

Finally, husband claims the trial court abused its discretion by basing its support order merely on wife's calculated needs. We disagree.

In deciding whether to modify spousal support based on a change of circumstances, the trial court is required to consider all of the same standards and criteria it had to consider in making the initial support order at the time of judgment and any subsequent modification order. (*In re Marriage of Stephenson* (1995) 39 Cal.App.4th 71, 77-78.) Those standards include the ability of the supporting party to pay spousal support, the needs of each party based on the standard of living established during the marriage, the duration of the marriage, the age and health of the parties, and any other factors the court determines are just and equitable. (Fam. Code, § 4320.)

Here, the record on its face demonstrates the trial court considered more than simply wife's needs in modifying spousal support. In addition to making findings regarding wife's continuing need for support, the court made specific findings as to the length of the marriage, wife's lack of job experience, husband's ability to pay support, and the age and health of the parties. To the extent husband complains of the trial court's failure to make any findings regarding the parties' marital standard of living and wife's efforts to become self-supporting,

husband waived his right to complain when he failed to bring it to the trial court's attention. (See *In re Marriage of Arceneaux*, *supra*, 51 Cal.3d at p. 1133.)

Citing *In re Marriage of Fransen* (1983) 142 Cal.App.3d 419, husband contends the trial court abused its discretion because it based the $1,900 support award solely on a calculation of wife's needs based on her monthly expenses. Husband's reliance on *In re Marriage of Fransen*, *supra*, is misplaced, however. In *Fransen*, which involved an initial support order, the appellate court was able to determine from the record that in making an award of $70 monthly in spousal support to the wife, the trial court based its order solely on the wife's needs calculated by the difference between her monthly expenses of $415 and her monthly income of $345, without properly considering the parties' 23-year marriage, the wife's lack of job skills, and the disparity between the parties' incomes. (*Id.* at pp. 423-425.) The appellate court held this mechanical calculation effectively ignored all the other factors the court was required to consider in setting spousal support. (*Ibid.*)

In contrast to *Fransen*, the present case does not involve an initial spousal support order but instead involves the modification of an existing spousal support order. Thus, the question before the trial court was not what spousal support order the court should make in the first instance in light of all the relevant factors, but rather what modification (if any) the court may make to the existing support order based on a change in any of the relevant factors since that order.

"The change of circumstance which authorizes a court to modify a support order means a change in the circumstances of the respective parties, i.e., a reduction or increase in the husband's ability to pay and/or an increase or decrease in the wife's needs [citation]." (*In re Marriage of Cobb* (1977) 68 Cal.App.3d 855, 860-861.)

As we have previously explained, on the incomplete record before us, we must presume the trial court found a change of circumstances that entitled wife to an increase in spousal support -- such as an increase in the reasonable cost of satisfying wife's needs since the last spousal support order in 1998. Thus, we find no abuse of discretion in the trial court's decision to increase wife's spousal support to $1,900 based on the amount of her current monthly expenses not covered by her cohabitant, Mah.

IV

Attorney Fees

Wife requests attorney fees on appeal based on her needs, husband's ability to pay, and the lack of a "reasonable ground" for husband's appeal. "'Such a request must properly be addressed to the trial court in the first instance, and we express no opinion on that subject.'" (*In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161, 180, quoting *In re Marriage of Schofield* (1998) 62 Cal.App.4th 131, 140-141; see also Cal. Rules of Court, rule 870.2(c).)

DISPOSITION

The spousal support order is affirmed.

ROBIE, J.

We concur:

MORRISON, Acting P.J.

HULL, J.